PP

v.

UTRAKUMARAN SAMIVEL

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[CRIMINAL APPLICATION NO: 44 -57-2005 (4)]
3 NOVEMBER 2006

CIVIL PROCEDURE: *Action - Reinstatement - Application for - Case struck out - Whether order a final order - Whether court has jurisdiction to alter or modify order - Whether striking out order a 'decision' within meaning of s. 3 Courts of Judicature Act 1964 - Whether order of judge appealable under s. 50 Courts of Judicature Act 1964 - Whether proper cause of action by way of appeal to court of appeal*

This was an application by the public prosecutor (encl. 2) seeking for the following orders (1) to reinstate Johore Bahru High Court Criminal Appeal No: 42-14-2004, which was struck out by the learned judge on 22 June 2005 and (2) to enlarge the time for filing the petition of appeal. The respondent in this application was charged with the offence of corruption under s. 4(a) of the Prevention of Corruption Act 1961. The respondent was tried and at the close of the prosecution, the sessions court judge found that the prosecution had not made out a *prima facie* case and as a consequence, he was acquitted and discharged. The public prosecutor appealed to the High Court against that decision. On the appointed date of the hearing of the criminal appeal on 22 June 2005 and after hearing the arguments of the deputy public prosecutor (DPP), the learned judge struck out the appeal upon finding that the petition of appeal was not filed by the prosecution within the period stipulated in s. 307 of the Criminal Procedure Code (CPC).

Held (dismissing the application):

(1) The factual circumstances herein clearly indicate that the order of the learned judge of 22 June 2005 was a final order in the sense that it was final in its effect. That order finally disposed of the rights of the parties. Hence, the matter had been concluded and that appeal was no longer before this court.

A The DPP had been heard during the hearing of the criminal appeal on 22 June 2005. This court does not have the jurisdiction to modify or alter that order. This matter should not be re-litigated before the same court. Any party aggrieved by that order should appeal and the higher court should deal
B with the matter. (para 5)

(2) Applying the principle enunciated in the case *Dato' Seri Anwar bin Ibrahim v. PP*, the striking out order of 22 June 2005 was a 'decision' within the meaning of that word in s. 3 of the
C Courts of Judicature Act 1964 (CJA) for the reason that such a decision does have the effect of finally determining the rights of the public prosecutor since it determined conclusively the principal matter in question in the said criminal appeal. (para 7)

D

(3) The order made by the learned judge was not a procedural ruling. It was a final order and therefore appealable under s. 50 of the CJA. The proper cause of action to be taken by the public prosecutor aggrieved by the order of 22 June 2005, in the circumstances of this case, was by way of an appeal to
E the court of appeal against that order and not by filing the present application to reinstate it. In view of the fact that the criminal appeal was no longer before this court, the application to enlarge the time for filing the petition of appeal does not arise. (para 7)

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Case(s) referred to:
Dato' Seri Anwar bin Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***

Legislation referred to:
G Courts of Judicature Act 1964, ss. 3, 50
Criminal Procedure Code, s. 307
Prevention of Corruption Act 1961, s. 4(a)

For the applicant - Zulqarnain Hassan DPP
For the respondent - Abdul Hamid Menon Abdullah; M/s RK Menon & Co

H *Reported by Suhainah Wahiduddin*

I

JUDGMENT

Azahar Mohamed J:

[1] This is an application by the public prosecutor by way of a motion in encl. 2 seeking for the following orders:

1. To reinstate Johore Bahru High Court Criminal Appeal No. 42-14-2004, which was struck out by the learned judge on 22 June 2005, and

2. To enlarge the time for filing the petition of appeal in Johore Bahru High Court Criminal Appeal No. 42-14-2004.

[2] The respondent in this application was charged with the offence of corruption under s. 4(a) of the Prevention of Corruption Act 1961 at the Sessions Court, Johore Bahru. The respondent was tried and at the close of the case for the prosecution the learned sessions court judge found that the prosecution had not made out a *prima facie* case and as a consequence, he was acquitted and discharged. The public prosecutor appealed to the High Court against that decision which was registered as Johore Bahru High Court Criminal Appeal No. 42-14-2004.

[3] On the appointed date of the hearing of the criminal appeal on 22 June 2005 and after hearing the arguments of the learned deputy public prosecutor (the DPP), the learned judge struck out the appeal. It appears that the learned judge took that course of action upon finding that the petition of appeal was not filed by the prosecution within the period stipulated in s. 307 of the Criminal Procedure Code (the CPC). The learned judge held that the appeal was deemed to be withdrawn. In this regard, it is important that I reproduce the relevant notes of proceedings in order to appreciate the order the of the learned judge:

Di Hadapan Yang Arif Hakim Dato' Kang Hwee Gee

Dalam Mahkamah Terbuka

Pada 22 Jun 2005

Encik Mohd. Jasiendra, Deputy Public Prosecutor

Says this is an appeal by the prosecution.

Prosecution had received on 11/4/2005 a letter from the Sessions Court (with notes and grounds of judgment).

Following this we filed a petition of appeal by letter dated 13/4/2005 (2 days later).

Sessions Court says they did not receive letter, and now says appeal had lapsed.

Here after receiving the notes and the grounds we sent our petition by post. But Sessions Court now says it had not received it.

Court:

See section 307(4) of Criminal Procedure Code – must before the clerk of court (not merely sending by post).

Under section 307(9) appeal deemed to be withdrawn.

Strike out.

Signed

(Dato' Kang Hwee Gee)
Hakim
Mahkamah Tinggi
Johor Bahru

Counsel:

Encik Mohd. Jasiendra (Timbalan Pendakwa Raya), untuk perayu

[4] The order of the learned judge was in the following terms:

Perintah

RAYUAN JENAYAH ini yang didengar pada hari ini dengan kehadiran Timbalan Pendakwa Raya En. Mohd. Jasiendra bagi perayu, dan pihak responden tidak hadir DAN SETELAH MENDENGAR hujahan-hujahan;

MAHKAMAH DENGAN INI MEMERINTAHKAN BAHAWA

rayuan yang dikemukakan oleh pihak perayu adalah dibatalkan.

DIPERBUAT dibawah tandatangan dan Meterai Mahkamah ini pada 22 Jun 2005.

(Wan Nor Aklima Binti Wan Salleh)
Penolong Kanan Pendaftar
Mahkamah Tinggi Malaya
Johor Bahru

[5] To my mind the factual circumstances in the instant case clearly indicate that the order of the learned judge of 22 June 2005 was a final order in the sense that it was final in its effect. It is obvious to me that order finally disposed of the rights of the parties. Hence, the matter had been concluded and that appeal is no longer before this court. An important point to note is that the learned DPP had been heard during the hearing of the criminal appeal on 22 June 2005. I do not think this court has the jurisdiction to modify or alter that order. This matter should not be re-litigate before the same court. Any party aggrieved by that order should appeal and the higher court should deal with the matter.

[6] It should be noted that s. 50 of the Courts of Judicature Act 1964 (the CJA) provides for the jurisdiction of the Court of Appeal to hear and determine criminal appeals against any decision made by the High Court in the exercise of its original jurisdiction. In this regard, it should be observed that s. 50 employs the expression 'decision'. The definition of that expression is provided for in s. 3 of the CJA which says that decision means 'judgment, sentence, or order, but does not include any ruling made in the course of the trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'. In dealing with this provision, NH Chan JCA said in *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [1999] 1 CLJ 537 at pp 548-550:

> Section 50 of the Act provides for criminal appeals from any decision of the High Court to the Court of Appeal but those appeals (since the amendment to s. 3 in 1998) are now to be confined only to decisions which would have the effect of finally disposing of the rights of the parties. Section 50 of the Act reads as follows:
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

A (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have
B arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

And s. 3 now gives the meaning of 'decision' as:

C In this Act, unless the context otherwise requires:

...

'decision' means judgment, sentence or order (but does not include any ruling made in the course of a trial or hearing of any
D cause or matter which does not finally dispose of the rights of the parties); ...

The words which we have bracketed were added by Amendment Act A1031 of 1998 which came into force on 31 July 1998. This new definition of 'decision', as in the amendment, does not include
E a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the word 'decision' is the type of judgments and orders which is termed 'interlocutory' by *26 Halsbury's Laws of England* (4th Ed) para 506 at p 240, which
F reads:

Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after
G judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.

An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with
H which it deals.

Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in
I the current version of s. 3 of the Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter

with which it deals. For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even though not conclusive (final) of the main dispute, may be conclusive (final) as to the subordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.

The real distinction is between (for want of a better word) what is called final judgments and orders and interlocutory judgments and orders. In general, a judgment or order which determines the principal matter in question is termed 'final': see *26 Halsbury's Laws of England*, para 505 at p 238. Actually, the use of the term 'final' is tautological as all judgments and orders are final. The term (final) is used for the purpose of distinguishing between judgments and orders and 'interlocutory' judgments and orders. The difference is that judgments and orders which are not termed 'interlocutory' judgments and orders are appealable under the new meaning of the word 'decision' as defined in s. 3 by the 1998 amendment. In other words, judgments and orders which determine the principal matter in question are termed 'final' judgments and orders, and they are appealable. But, those judgments and orders which give no final decision on the matters in dispute (which are termed 'interlocutory' judgments and orders) are now no longer appealable.

[7] Applying the principle enunciated in that case, it is my judgment that the striking out order of 22 June 2005 is a 'decision' within the meaning of that word in s. 3 of the CJA for the reason that such a decision does have the effect of finally determining the rights of the public prosecutor since it determines conclusively the principal matter in question in the said criminal appeal. In my view, the order made by the learned judge was not a procedural ruling and that it was a final order and therefore appealable under s. 50 of the CJA. It is for that reason, in my view, that the proper cause of action to be taken by the Public Prosecutor aggrieved by the order of 22 June 2005, in the circumstances of this case, was by way of an appeal to the Court of Appeal against that order and not by filing the present application to reinstate it.

[8] One final point. In view of the fact that the criminal appeal is no longer before this court, the application to enlarge the time for filing the petition of appeal does not arise.

[9] For the reasons given above, the application fails and is accordingly dismissed.